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Supreme Court of the United States

OCTOBER TERM, 1952

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SUPREME COURT, U.S.

No. 226

J. LAURITZEN,

Petitioner,

against

EVALD JOHANN LARSEN,

Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1952

No. _____

J. LAURITZEN,
Petitioner,

against

EVALD JOHANN LARSEN,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of J. Lauritzen respectfully shows to this Honorable Court as follows:

Nature of the Proceedings

This is a petition for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Second Circuit, filed May 2, 1952, affirming the judgment in favor of the plaintiff entered on December 21, 1951, in the District Court of the United States for the Southern District of New York.

Jurisdiction

The jurisdiction of this Court to grant a writ of certiorari is provided by Title 28, United States Code, Section 1254.

Opinions Below

The verdict of the jury in the District Court is printed at pages 115-116 of the record. The defendant's motions to dismiss and the denial thereof by the Trial Court are printed at pages 61, 97, 116 and 117 of the record. The judgment of the District Court of the United States for the Southern District of New York is printed at page 120 of the record. There is no reported District Court opinion.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 196 F. (2d) 220 and is printed at pages 127-128 of the record and the judgment of the United States Court of Appeals for the Second Circuit is printed at pages 129-130 of the record.

Statement of the Facts

The complaint was filed on behalf of Evald Johann Larsen to recover the sum of $15,000 for injuries allegedly received while serving as an able-bodied seaman on board the S.S. Randa on October 7, 1946. Liability was predicated on the negligence of the defendant-owner through its employees under the provisions of Section 33 of the Act of June 5, 1920, Title 46, United States Code, Section 688, known as the Jones Act.

On July 25, 1946, Evald Johann Larsen, a Danish citizen and a resident of Denmark who was temporarily in New York City, signed articles to serve aboard the S.S. Randa as an A.B. at the standard rate of pay agreed upon by the Danish Seamen's Union (pre-trial order, 16, 44, Def. Exh. A, 45). The S.S. Randa was a vessel flying the Danish flag and so registered, and was owned and operated by the petitioner, J. Lauritzen (pre-trial order, 16), a Danish citizen. The articles signed by Larsen called for a voyage to South America and further (pre-trial order, 16, Def. Exh. A, 44, 45) and bound Larsen to serve aboard the S.S.

Randa for an indefinite period with the right to leave the vessel on seven days' notice, the owner having a similar right to discharge Larsen on seven days' notice (47).

The articles further stated that each member of the ship's crew was employed "on the basis of the regulations contained in the (Danish) Seaman's Act," as well as in accordance with the provisions set forth opposite each of their signatures (Def. Exh. A, 44, 45, middle of 1st page, directly above heavy horizontal line, also 2nd page, column 15).

After leaving New York the S.S. Randa called at various South American ports and arrived in Havana, Cuba, about the beginning of October, 1946 (26). On October 7, 1946, while the vessel was still in Havana, Larsen was injured when he fell from the top of No. 1 hatch into the hold while engaged in inserting hatch boards with a fellow seaman (33-34).

Following the accident Larsen was hospitalized in Havana, Cuba, at the petitioner's expense (pre-trial order, 15-16, 35, 49). Subsequently, Larsen was returned to the United States as a passenger aboard a vessel owned by the petitioner and upon arrival in New York was admitted to the U. S. Marine Hospital at Ellis Island, where again all hospital and medical expenses were paid by the petitioner (pre-trial order, 16, 37, 49). Larsen was discharged as an inpatient from the United States Marine Hospital on December 9, 1946 and received outpatient treatment at the petitioner's expense until January 9, 1947, at which time he was declared fit for duty (40-41, pre-trial order, 16).

Following the accident Larsen received all wages due him up to the date of the accident (pre-trial order, 16, 39), and also received the seven days wages to which he was entitled under the Danish Maritime Law (39-40 Def. Exh. D, 90-92). In addition, Larsen received maintenance and subsistence from December 10, 1946, the date he was discharged from the Ellis Island Marine Hospital, until December 30, 1946, (90). During the course of Larsen's treatment in New York, the petitioner offered Larsen free transportation to Denmark for further treatment, but this offer was refused

by Larsen (50). These were the benefits to which Larsen was entitled under the Danish law as subscribed to by Larsen when he signed the articles to serve aboard the S.S. Randa (Def. Exh. C, 20-21, 89; Def. Exh. A, 44, 45; Def. Exh. D, 90-92).

The Statute Involved

Section 33 of the Act of June 5, 1920, 41 Stat. 1007, Title 28, United States Code, § 688, known as the Jones Act, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Proceedings and Decisions Below

Upon the trial below in the United States District Court for the Southern District of New York before a jury the defendant, the petitioner herein, moved at the end of plaintiff's case, at the end of the defendant's case and after the jury verdict to dismiss the complaint for lack of jurisdiction. The motions were made on the grounds that this was an action between citizens of Denmark and, therefore, outside the jurisdiction of the Court and on the

grounds that the Danish Law was properly applicable and not the Jones Act. These motions were denied by the Trial Court (61, 97, 116-117). The Trial Court also denied defendant's request to charge that the jury must find for the defendant if it found that the defendant had fulfilled its obligations under the Danish law (113) and the defendant excepted to the charges of the Trial Court that defendant was liable to plaintiff for injuries caused by the negligence of defendant's officers and seamen (113) no such right being given by the Danish law, and the charge that the Danish law had no application in the case (114-115).

Thereafter, the defendant, the petitioner herein, J. Lauritzen, appealed from the judgment in favor of the plaintiff as entered on December 21, 1951, and in particular from the denial of the above motions made by the defendant, as well as from the above denials of defendant's requests to charge and from the charges of the Trial Court to the effect that American law, rather than Danish law was to be applied.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the Trial Court on the authority of *Kyriakos* v. *Goulandris*, 151 Fed. 2d 132 (2nd Cir., 1945) and *Taylor* v. *Atlantic Maritime Co.*, 179 Fed. 2d 597 (2nd Cir., 1950) cert. den. 341 U. S. 915.

The Question Presented

Does the Jones Act govern the liability of a foreign shipowner to a foreign seaman who signs on a foreign vessel in a United States port and is subsequently injured aboard the vessel in a foreign port as a result of the negligence of a fellow-seaman when that foreign seaman has recovered all the benefits to which he is entitled under the articles which he has signed and under the laws of the country whose flag that vessel flies?

Reasons for Granting the Petition

1. The decision of the United States Court of Appeals for the Second Circuit in the instant case is in direct conflict with the holding of this Court in *New York Central R. R. Co.* v. *Chisholm,* 268 U. S. 29, 45 S. Ct. 402, 69 L. Ed. 828 (1925); *Jamison* v. *Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930), and in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932).

In *New York Central R. R. Co.* v. *Chisholm, supra,* the Supreme Court of the United States considered the applicability of the Federal Employers' Liability Act to an injury sustained by an employee of an American railroad company while operating in Canada. This decision is in point, since the Jones Act states that the United States statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees are to be applied to seamen's injuries. The Federal Employers' Liability Act of 1908 was thus incorporated into the Jones Act. The Supreme Court of the United States denied recovery under the Act to the administrator of the deceased railway employee who was fatally injured in Canada and held that there was no right of action based on the Federal Employers' Liability Act when the site of the alleged act of negligence was outside the United States.

Again, in *Jamison* v. *Encarnacion, supra,* the Court affirmed its position that a seaman's rights under the Jones Act depended on negligence, i.e., tort, and not upon contract. Under the Jones Act a seaman "* * * is entitled to recover if * * * his injuries resulted from * * * negligence" (p. 639) since "the Federal Employers' Liability Act does not create liability without fault" (p. 640).

The necessity of some element of negligence occurring in the United States is emphasized in *Cortes* v. *Baltimore Insular Line, supra,* where Justice Cardozo stated (p. 374) that "* * * Here performance was begun when the vessel

started on her voyage (from the United States) with Santiago (a co-plaintiff) aboard and with care and cure cut off from him unless furnished by officers and crew. From that time forth withdrawal was impossible and abandonment a tort."

Nothing in the record in this case now before the Court indicates the existence of any negligence before the "Randa" reached Havana.

In line with the above decisions of the Supreme Court of the United States, the holdings of the United States Court of Appeals for the Second Circuit in this case and in *Taylor* v. *Atlantic Maritime Co., supra,* would appear to be erroneous, since in both those cases the foreign seamen sustained their illnesses or injuries outside the territorial waters and continental limits of the United States.

2. The precise question here presented has never been directly passed on by the Supreme Court of the United States.

Since the passage of Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. Sec. 688, hereinafter referred to as the Jones Act, numerous cases have arisen in the United States courts involving the rights of foreign seamen serving on foreign vessels to the benefits of the Jones Act. Many of these cases have been appealed to the United States Courts of Appeals with varying results, but the Supreme Court of the United States has never passed upon the applicability of the Jones Act to foreign seamen serving aboard foreign vessels.

In *Plamals* v. *S.S. Pinar Del Rio,* 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827 (1928), the question of the applicability of the Jones Act to a foreign seaman employed on a foreign ship and injured in American waters was expressly left open. Plamals was a Spanish citizen and a member of the crew of the British ship S.S. Pinar Del Rio. While the vessel was anchored in Philadelphia, Plamals was injured while being hoisted on a rope to paint the smokestack. Six months after the accident he began a proceeding *in rem* against the ship in the District Court for the Southern

District of New York. The District Court ruled that the rights and liabilities of the parties were fixed by the law of the ship's flag, and accordingly dismissed the libel. The Court of Appeals for the Second Circuit held on appeal that a lien against the vessel was essential to every proceeding *in rem*, and that no such lien arose by reason of the Jones Act in favor of the injured seaman. Upon that ground the Court of Appeals affirmed the dismissal of the libel. The Supreme Court of the United States affirmed on those grounds in an opinion by Mr. Justice McReynolds, writing as follows at page 155:

> "We agree with the view of the Circuit Court of Appeals and find it unnecessary now to consider whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters."

The Supreme Court of the United States also left the question open in *Uravic, Administratrix* v. *F. Jarka Company, Inc.*, 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312 (1931). The action was for causing the death of the plaintiff's intestate, Uravic, an American citizen employed as a longshoreman by F. Jarka Company, a Delaware corporation. At the time he received the injury that caused his death, Uravic was unloading a German vessel in the harbor of New York. The Supreme Court of the United States, in an opinion by Mr. Justice Holmes, reversed a judgment of the Court of Appeals of the State of New York which had affirmed the dismissal of the complaint in the death action brought against the Jarka Company. The Supreme Court of the United States held that the Jones Act was applicable to the case of an American longshoreman injured aboard a private foreign ship in American waters while engaged in discharging that ship. With respect to the applicability of the Jones Act to foreign seamen on foreign vessels, however, the question was left open, for Mr. Justice Holmes wrote as follows (p. 241):

"If it should appear that, by valid contract or special circumstances, seamen on a foreign ship should not be protected by the statute, it will be time enough to consider the exception when it is presented. But the purport of the words is plain and there is no reason to deny stevedores the benefit of them, even if exceptions to the rule for seamen may be found upon peculiar facts."

Despite the anticipatory language of these opinions, the frequently-presented problem of the applicability of the Jones Act to a foreign seaman serving on a foreign vessel, who is injured on the high seas, has never been passed upon by the Supreme Court of the United States.

3. In order to effect uniformity of decisions in this field, it is necessary for the Supreme Court of the United States to pass upon the question.

Since the decisions of the Supreme Court of the United States in *Plamals* v. *S.S. Pinar Del Rio, supra,* and *Uravic, Administratrix* v. *F. Jarka Company, Inc., supra,* the question of the applicability of the Jones Act to foreign seamen serving aboard foreign vessels has been passed upon by the United States District Courts and the United States Courts of Appeals, as well as by the New York Court of Appeals, with varying results.

In 1937, in *The Paula,* 91 F. (2d) 1001, 1937 A. M. C. 988, cert. den. 302 U. S. 750, 58 S. Ct. 270, the Court of Appeals for the Second Circuit affirmed the District Court decree dismissing the libel and declining to exercise jurisdiction in a case involving a German seaman who had signed articles in Chile to serve on a Danish ship on a voyage to Brooklyn, New York. The libelant was injured during the performance of his duties on board the ship while at the port of Jacksonville, Florida. The libelant was relegated to his claim under the Danish law before the Danish Consul.

In 1942, in *Gambera* v. *Bergoty,* 132 F. (2d) 414, 1943 A. M. C. 45, cert. den. 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699, the United States Court of Appeals for the

Second Circuit granted relief under the Jones Act to an alien seaman injured on board a foreign ship in United States territorial waters on a voyage from Trenton, New Jersey, to New York. The added factors in that case were, however, that the libelant had been domiciled in the United States for over twenty years, during the greater part of which he had served on American ships, and he had, in fact, already taken out his "first papers" for naturalization.

In 1945, in *Kyriakos* v. *Goulandris,* 151 F. (2d) 132, 1945 A. M. C. 439, the Court of Appeals for the Second Circuit held that the Jones Act was applicable to a Greek seaman who had signed articles to serve aboard a Greek vessel, the articles having been signed in a United States port. The Court was careful to point out, however, that Kyriakos had signed on the vessel for a voyage beginning and ending in the United States and that he had been injured when assaulted ashore by a fellow crew member in Fernandina, Florida. There was a strong dissent to this decision written by Judge Learned Hand.

Following the *Kyriakos* decision, the Court of Appeals for the Second Circuit considered the applicability of the Jones Act to foreign seamen in *O'Neill, Administratrix* v. *Cunard White Star Line, Ltd.,* 160 F. (2d) 446, 1947 A. M. C. 505. In that case the Court denied Jones Act relief to the administratrix of a British seaman injured on the high seas, who had signed articles in Britain to serve aboard a British vessel, even though the deceased had been a long-time resident in the United States. In so doing the Court stated that there was nothing in the language of the Jones Act to indicate that it was to be applied to injuries occurring on the high seas.

In 1948, in *Sonnesen* v. *Panama Transport Co.,* 298 N. Y. 268, 82 N. E. (2d) 569 (1948); cert. den. 337 U. S. 919, 69 S. Ct. 1157, the New York Court of Appeals denied the benefits of the Jones Act to a Danish seaman, who had signed articles in New York for a voyage beginning and terminating in the United States, when that seaman sought recovery for an illness occurring on the high seas. In de-

nying the relief sought, the New York Court of Appeals ruled that the tort liability was to be determined by the law of the flag, in that case the law of Panama.

In 1950 the United States Court of Appeals for the Second Circuit decided the case of *Taylor* v. *Atlantic Maritime Co.*; 179 F. (2d) 597, 1950 A. M. C. 352, cert. den. 341 U. S. 915, 71 S. Ct. 736. Taylor, a Panamanian citizen, sought to recover for aggravation of tuberculosis from the Panama shipowner under the provisions of the Jones Act, Taylor having signed articles to serve aboard the vessel in Norfolk, Virginia. The United States Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, held that Taylor was entitled to recover under the Jones Act and, in so holding, reached a conclusion diametrically opposite from that reached by the New York Court of Appeals in *Sonnesen* v. *Panama Transport Co.*, *supra*.

Now, in 1952, in the instant case, the United States Court of Appeals for the Second Circuit has in effect held that the Jones Act is to be applied to a foreign seaman serving aboard a foreign vessel, who signed articles in a United States port, but who was injured through the negligence of a fellow-seaman in a foreign port, even though the foreign seaman proceeded to recover all the benefits to which he was entitled under the terms of the articles which he signed and under the law of the flag of the vessel.

The confusion which has resulted from this succession of cases in the United States District Courts, the United States Courts of Appeals and in the State Courts can only be clarified and settled through a decision of the Supreme Court of the United States on the question of the applicability of the Jones Act to foreign seamen serving aboard foreign vessels where the place of sign-on is a United States port and where the place of injury is a foreign port.

4. The decision of the United States Court of Appeals for the Second Circuit in this case is at variance with the

long established law as expressed by this Court as well as other Courts of the United States.

The principle has been laid down time and again that in choosing between the application of the law of the port or the law of the flag, the law of the flag shall control as to all those matters affecting only the internal economy and discipline of the vessel involved. In line with this principle, the law of the port has been applied only when the events occurring on board foreign vessels in our ports were of such a nature as to effect the peace and tranquillity of the port.

The Scotland, 105 U. S. 24, 26 L. Ed. 1001 (1881);
The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152 (1884);
Wildenhus's Case, 120 U. S. 1, 7 S. Ct. 385, 30 L. Ed. 565 (1887);
United States v. *Rodgers*, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893);
Thompson Towing & Wrecking Association v. *McGregor*, 207 F. 209 (6th Cir., 1913);
Grand Trunk Ry. Co. v. *Wright*, 21 F. (2d) 814 (6th Cir., 1927), affirmed 278 U. S. 577, 49 S. Ct. 176, 73 L. Ed. 516.

In the decision in *Taylor* v. *Atlantic Maritime Co., supra*, the United States Court of Appeals for the Second Circuit subscribed to this general principle, but then proceeded to ignore it by applying the Jones Act, even though that statute did not specifically call for such application, to matters affecting the relationship between a foreign vessel and its foreign crew on the high seas. In the instant case, which the United States Court of Appeals held was governed by *Taylor* v. *Atlantic Maritime, Co., supra*, the Jones Act was applied to an incident arising in a foreign port involving a Danish seaman aboard a Danish vessel.

5. The question of whether the Jones Act governs the liability of a foreign shipowner to a foreign seaman who signs on a foreign vessel in a United States port and is subsequently injured on the high seas, when that seaman has recovered all the benefits to which he was entitled under the foreign law, is a substantial one which should be passed on by the Supreme Court of the United States.

Prior to the decision of the United States Court of Appeals in *Taylor* v. *Atlantic Maritime Co., supra,* it had been assumed by foreign shipowners that their obligation to foreign seamen was governed by the law of the flag and the contractual terms of the articles signed, regardless of the place of sign-on. At the present moment foreign vessels calling at United States ports who sign on foreign seamen while in those ports are subjected to possible double liability —both under the law of the flag and under the laws of the United States. The latest decisions have raised a question as to the validity of the articles signed by these foreign seamen in United States ports. As a result, foreign shipowners operating vessels which call at United States ports, of which there are a great number, have been unable to determine the extent of their liability to foreign seamen signed on in the United States for personal injuries occurring aboard their vessels.

Social justice requires that prompt attention be given to injured seamen in accordance with the law of the flag; for it is the consul of the nation concerned who has disciplinary power over the master. By refusing to permit proof of the Danish law, which enforces liability without fault on principles akin to workmen's compensation, the courts below retarded, rather than advanced, seamen's rights. *Farrell* v. *United States, et al.*, 336 U. S. 511 (1949).

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court to review the decision and judgment herein of the United States Court of Appeals for the Second Circuit.

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Supreme Court of the United States

OCTOBER TERM, 1952

No.

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EVALD JOHANN LARSEN,
Plaintiff-Respondent.

BRIEF FOR PETITIONER

POINT I

The terms of the Jones Act do not make it applicable to foreign seamen on foreign vessels who are injured beyond the territorial limits of the United States.

The Jones Act, Section 33 of the Merchant Marine Act of 1920, was derived from Section 20 of the Seamen's Welfare Act of March 4, 1915, 38 Stat. 1185. The 1915 Congressional Act was entitled "Act to Promote the Welfare of American Seamen." Section 20 of that Act provided as follows:

> "That in any suit to recover damages for an injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

By the amendment of this section in 1920, seamen were given a right of action against their employers for injuries sustained as a result of the negligence of the master, or members of the crew, and their dependents a right of recovery for their death. This was accomplished by adopting the provisions of the Federal Employers' Liability Act of 1908 and its amendments and making them a part of the Maritime Law of the United States.

Nowhere in the Jones Act does it state that the provisions therein contained shall be or should be applicable to foreign seamen serving aboard foreign vessels who are injured outside the territorial limits of the United States. It has been contended that although the express language does not so state, it was, nevertheless, the intent of Congress to include within the provisions of this section foreign seamen serving aboard foreign vessels. The language of the section, far from supporting such a contention, would appear to point the other way. The closing sentence of Section 33 reads as follows:

> "* * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The use of the word "jurisdiction" has been interpreted not to relate to the general jurisdiction of the court, but to venue only. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924). Even granting such an interpretation of the word "jurisdiction," however, this closing sentence of Section 33 makes it abundantly clear that Congress had in mind domestic employers and shipowners rather than foreign shipowners when it adopted this particular phraseology.

What foreign shipowner would be likely to reside in or have his principal office in the United States? How would a foreign seaman proceed under the language of the Jones Act if his employer, the foreign shipowner, did not live in the United States and did not have any office located within the United States?

If Congress had intended to give a remedy to the foreign seaman serving aboard a foreign vessel under the Jones Act, it could very easily have so provided by giving him an *in rem* remedy. With such a remedy available, the foreign seaman could have proceeded against the vessel upon her arrival in any United States port. It is significant that Congress did not make any such provision. A lien against the vessel is essential to every proceeding *in rem*, and no such lien arises by reason of the Jones Act in favor of an injured seaman. This Court specifically so held in *Plamals* v. *S.S. Pinar Del Rio*, 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827 (1928).

There may be isolated instances in which the defendant employer of the foreign seaman, while having his principal office located in the foreign country, may at the same time have an office in this country, so as to allow the injured foreign seaman to start an action under the Jones Act in the court of the district in which such local office is located, but if we are to impute to Congress the intent to provide for foreign seamen serving aboard foreign ships under the terms of the Jones Act, then we must be prepared to admit that by the use of the language of the Act as presently written, Congress has given only a partial remedy, since the majority of foreign seamen would find it impossible to comply with the jurisdiction and venue requirements as presently constituted.

It has been contended that the remedy of the Jones Act is available to foreign seamen serving aboard foreign vessels based on the decisions of this Court in *Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1903); *Sandberg* v. *McDonald*, 248 U. S. 185, 39 S. Ct. 84, 63 L. Ed. 300 (1918); *Strathearn S.S. Co.* v. *Dillon*, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607 (1919); and *Jackson* v. *S.S. Archimedes*, 275 U. S. 463, 48 S. Ct. 164, 72 L. Ed. 374 (1928).

Patterson v. *Bark Eudora, supra*, involved Section 24 of the Act of December 21, 1898, 30 Stat. 755, 763, which amended Section 10 of Chapter 121 of the Laws of 1884.

This amendment made it unlawful in any case to pay any seaman wages in advance of the time when he had actually earned same. It was further stated that this section was to be applicable as well to foreign vessels as to vessels of the United States. The case involved a question of the power of Congress to so enact a provision applicable to foreign vessels. In the words of Mr. Justice Brewer, at page 173:

> "But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the Fourteenth Amendment to the Federal Constitution * * *."

The Supreme Court held that the provision making the Act specifically applicable to foreign vessels was constitutional and within the domain of Congress under the commerce clause of the Constitution. The holding of the Court, therefore, was not that Congress intended to make the statute applicable to foreign vessels, but only that Congress had not trespassed on constitutional rights in making the statute specifically applicable to foreign vessels. The most that can be said for this case in connection with the applicability of the Jones Act to foreign vessels and foreign seamen is that Congress would be within constitutional limits if it were to provide that the Jones Act were to apply to foreign vessels and foreign seamen serving on those vessels. The value of the holding in *Patterson* v. *Bark Eudora, supra;* in this connection is vitiated by the fact that in the Jones Act Congress has made no such specific provision.

Sandberg v. *McDonald, supra,* involved the interpretation of Section 11 of the Seaman's Act of March 4, 1915, 38 Stat. 1164, which made similar provisions prohibiting the advance payment of wages to a seaman and also stated that the provisions were to apply as well to foreign vessels while in the waters of the United States as to vessels of the United States. This statute had its origin in the very same Dingley

Act of 1884, discussed above in *Patterson* v. *Bark Eudora, supra.* Here the Supreme Court of the United States held that the provisions of Section 11 did not apply to advancements made to alien seamen shipping abroad on foreign vessels, pursuant to contracts valid under the foreign law. This Court held that specific provisions had been made to apply Section 11 to foreign vessels while in the waters of the United States, but that there was no intent to regulate the affairs of the foreign vessels while outside the territorial waters of the United States, since, as stated at page 195:

> "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."

Strathearn S.S. Co. v. *Dillon, supra,* presented questions arising under the Seaman's Act of March 4, 1915, 38 Stat. 1164. This was the same statute considered in *Sandberg* v. *McDonald, supra,* but here this Court was required to consider Section 4 of the Act, which stated that every seaman on a vessel of the United States was to be entitled to receive, on demand, from the master of the vessel one-half of his wages earned to date at every port where such vessel might load or deliver cargo before the end of the voyage. Here again, however, the section was made specifically applicable to seamen on foreign vessels while in the harbors of the United States. It also provided that the courts of the United States were to be open to such seamen for the enforcement of the Act. The Supreme Court of the United States rejected the contention that the fact that certain contracts which ran counter to the purposes of the statute were voided, rendered the statute unconstitutional as being destructive of contract rights. The Supreme Court held that the matter was fully considered in *Patterson* v. *Bark Eudora, supra.*

Finally, in *Jackson* v. *S.S. Archimedes, supra,* the Supreme Court again considered Section 10 of the Dingley Act of 1884, as amended by the Seaman's Act of 1915, and

the Merchant Marine Act of 1920, as it related to advance wages paid by foreign vessels to foreign seamen while in foreign ports. Here again, the Supreme Court held, that in the absence of a specific provision applying the Act to advance wages paid by foreign vessels to foreign seamen while in ports other than the United States, such payments were not covered by the Act, either expressly or by implication.

These cases hold, therefore, no more than that it would be constitutional for Congress to provide that foreign seamen serving upon foreign vessels were to be considered within the framework of the remedies available under Section 33 of the Merchant Marine Act of 1920—that is, the Jones Act. But they also hold that, although these statutes relating to seamen were valid when applied to vessels within United States waters, they were not to be applied to acts committed in foreign ports.

It is not the contention of the petitioner that Congress is without power to so legislate as to foreign vessels and foreign seamen, but it *is* contended that there is no language in Section 33 of the Merchant Marine Act of 1920 making the provisions applicable to foreign vessels and foreign seamen, and that, in the absence of such express provisions, we should not impute to Congress an intent which is totally lacking on a reading of the statute or through reference to the legislative history or by reference to the title of the Seaman's Act of 1915, 38 Stat. 1164, to which the Jones Act was an amendment, which read in part:

> "An act to promote the welfare of American seamen in the Merchant Marine of the United States."

While admitting that the title is no part of a statute and cannot be used to set at naught the statute's obvious meaning (*Patterson* v. *Bark Eudora, supra*), the title here does serve as an indication of the intent of Congress, since nowhere in Section 33 is there any contradictory language to indicate that foreign seamen serving upon foreign vessels

were intended to be included in the class of seamen whose welfare was to be promoted.

The question of the applicability of the Jones Act to an injury sustained by an alien on the high seas was discussed by Judge Learned Hand in *O'Neill* v. *Cunard White Star, Ltd.*, 160 F. (2d) 446, 1947 A. M. C. 505 (2d Cir., 1947). In that case the Court of Appeals for the Second Circuit denied the benefits of the Jones Act to the administratrix of a British seaman injured on the high seas, who had signed articles in Britain to serve aboard a British vessel, even though the deceased had been a long-time resident of the United States. The language of the decision of Judge Learned Hand is significant in that it was written after the decision of that same court in *Kyriakos* v. *Goulandris*, 151 F. (2d) 132, 1945 A. M. C. 439 (2d Cir., 1945), whereby a Greek seaman who had signed on a Greek vessel for a voyage beginning and ending in the United States was allowed to recover under the terms of the Jones Act for an injury sustained ashore in Florida, when he was assaulted by a fellow crew member. In his decision in the *O'Neill* case, Judge Learned Hand indicated that the *Kyriakos* case did not help the Court to decide whether it should now hold that the Jones Act was applicable, since in the *Kyriakos* case as well as in other prior cases the act or omission was within United States waters. Judge Learned Hand wrote as follows (at page 448):

> "* * * It is true that a state may impose duties upon its own nationals while they are abroad; but *the plaintiff must prove that Congress meant to impose duties upon the nationals of other states while they were beyond the territorial limits of the United States*, a proposition vastly different in its consequences. Perhaps Congress might go even so far as that, granted an occasion pressing enough; but surely there should be the clearest warrant of its purpose to do so, for it is as extreme an exercise of power as one can well imagine: a bit of absolution beyond all ordinary conventions.

> *There is nothing in the books leading us to suppose that the Act should be so construed; rather, the contrary.* In *Uravic* v. *Jarka Co.*, for example, the whole discussion proceeds on the assumption that it is a question of the lex loci delicti; and, as we have just explained, our own decisions are irrelevant. We are thrown back upon the statute itself. Is there sufficient reason for supposing that Congress meant to confer upon American seamen the new rights against all employers no matter where the wrongful act occurs? * * * *The purpose of Congress, so far as we can reconstruct it, seems to us therefore rather to forbid, than to justify, such an interpretation of the words of the Act, which are themselves neutral;* and, as we have tried to show, all analogies are in accord. We hold that so far as the libel invoked the Jones Act, it was bad on the merits, and the order was right." (Emphasis supplied.)

According to the language of the opinion, Judge Hand did not believe in 1947 that Congress intended the Jones Act to apply to seamen regardless of the place of injury.

Judge Learned Hand later expressed his opinion as to the intent of Congress on this subject in 1950 in his opinion in *Taylor* v. *Atlantic Maritime Co.*, 179 F. (2d) 597, 1950 A. M. C. 352, cert. den. 341 U. S. 915, 71 S. Ct. 736, the facts of which have already been outlined in the petition. In discussing the subject, he wrote as follows at page 600:

> "* * * To Judge Swan and me it seems, on the other hand, that, before we impute to Congress the will to change the long settled international understanding that the law of the flag controls in such matters, we should find a more definite expression of that purpose. We of course recognize that it is only a question of interpreting the statute, not of power;[16] but the possible consequences of the innovation seem to us to forbid its ready assumption under the facile phrase of the 'policy of the Act.' * * *"

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[16] "*Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002; *Strathcarn S.S. Co.* v. *Dillon*, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607."

It would appear, therefore, that Judge Hand was unwilling to impute to Congress the intent to apply the Jones Act to foreign seamen serving aboard foreign vessels unless there could be found a definite expression of that purpose. As will be pointed out later, the Court never indicated in the *Taylor* case where any such evidence of the intent of Congress was found, but nevertheless proceeded to ignore the long settled international understanding that the law of the flag should control in such matters and held that Taylor could recover under the Jones Act. In so holding, the Court left unanswered the question of where the expression of such an intent on the part of Congress was to be found.

POINT II

The Jones Act is not applicable to this action, since the action sounds in tort and must be governed by the law of the flag and the law of the place of the injury.

In this action a Danish seaman seeks recovery under the Jones Act (complaint, 6) for injuries sustained aboard a Danish ship while the ship was in Havana, Cuba (pre-trial order, 16), and the only connection with the United States was that the seaman signed articles on the Danish form while temporarily in New York (pre-trial order, 16, 24, 44).

It is submitted that the basis for the recovery sought against the shipowner is in fact the alleged liability of the shipowner for the tortious conduct of a fellow-seaman of the plaintiff, and that this liability must be governed by the Danish law, the law of the flag and the law of the place of the injury.

In *Taylor* v. *Atlantic Maritime Co., supra,* the basic facts of which have been set out above, Judge Learned Hand, in considering the question of the law to be applied to torts at sea, wrote as follows at page 598:

> "The variant at bar is that the seaman signed articles in the United States. So far as such a claim sounds in tort, the law of the flag should still apply, which will not include the Jones Act."

In *Kyriakos* v. *Goulandris, supra,* Kyriakos sought to recover from the Greek shipowner for injuries sustained when a fellow crew member attacked him ashore in Fernandina, Florida. That Judge Learned Hand in his dissenting opinion considered that the liability of the shipowner, if anything, was a tort liability is brought out by the following at page 140:

> "In closing it is perhaps well to notice that, although the assault took place ashore, the only question is whether Bouritis's undoubted liability is to be imputed to the ship's owner."

There is no question but that Bouritis's liability towards Kyriakos based on his unwarranted assault was a tort liability, and if that liability is to be imputed to the shipowner, it would still be a liability sounding in tort.

In *Sonnesen* v. *Panama Transport Co.*, 298 N. Y. 268, 82 N. E. (2d) 569 (1948), cert. den. 337 U. S. 919, 69 S. Ct. 1157, the New York Court of Appeals indicated that it felt that the liability of a shipowner to one of its seamen who contracted tuberculosis was a tort liability, writing as follows at page 266:

> "We think the jury was justified, on the evidence, in finding that defendant's conduct toward plaintiff was wrongful and tortious (see *Scarff* v. *Metcalf*, 107 N. Y. 211; *Cortes* v. *Baltimore Insular Line, supra,* 287 U. S. at pp. 372-376), but we find no basis for applying the Jones Act to that wrong."

Further support for the contention that recovery under the Jones Act for an injury suffered by reason of the negligence of a fellow-servant is a recovery for a tort is found in *New York Central R. R. Co.* v. *Chisholm*, 268 U. S. 29,

45 S. Ct. 402, 69 L. Ed. 828 (1925), where the Supreme Court considered the applicability of the Federal Employers' Liability Act to an injury sustained by an employee of an American railroad company while operating in Canada. This decision is in point since the Jones Act states that the United States statutes modifying or extending the common law, right or remedy in cases of personal injury to railway employees shall apply to seamen's injuries. The Federal Employers' Liability Act of 1908 was thus incorporated into the Jones Act. In this case the Supreme Court denied recovery under the Federal Employers' Liability Act to the administrator of the deceased employee of the New York Central Railroad who was fatally injured in Canada, and made it quite clear that the recovery, if anything, was a tort recovery in the following terms at page 31:

> "The statute under consideration lacks the essential characteristics of those, now very common, which provide for compensation to employees injured in the line of duty irrespective of the master's fault. It only undertakes to impose liability for negligence which must be shown by proof (*Southern Ry.* v. *Gray,* 241 U. S. 333, 339; *New York Central R. R.* v. *Winfield,* 244 U. S. 147, 150) and demands under it are based wholly upon tort."

This decision interprets the very statute with which we are presently concerned, and holds, in effect, that it deals with tort rather than contract remedies and that it is not to be applied extra-territorially, for Mr. Justice McReynolds stated that, upon a construction of the Act, the action would not lie, since:

> "The carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the alleged act of negligence occurred; and the administrator could not rely upon any others."

New York Central R. R. Co. v. *Chisholm, supra,* presented a situation even more striking than the one at hand, since

the plaintiff's decedent had not only been employed in the United States, but was also a citizen of the United States and predominantly domestically employed. The holding of the Supreme Court is that there can be no right of action based upon the Federal Employers' Liability Act when the site of the alleged act of negligence is outside the United States. It would follow, therefore, that the Jones Act would be similarly limited since the Jones Act expressly extends to seamen all the United States statutes modifying or extending the common law in cases of personal injury to railway employees. If the United States Supreme Court has held that the Federal Employers' Liability Act is not to be extended beyond the borders of the United States, even in cases of injury to United States citizens employed in the United States, then there would seem to be no grounds upon which the application of the Jones Act could be extended to injuries sustained by foreign seamen in a foreign port aboard a foreign vessel.

This holding was affirmed in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932), the Supreme Court considering the question of liability of an American shipowner for an injury suffered by a seaman in the course of his employment as a result of the failure of the master of the ship to furnish him care or cure when stricken with pneumonia. This Court held that such an injury was a "personal injury" resulting from negligence within the purview of Section 33 of the Merchant Marine Act as supplemented by the Federal Employers' Liability Act. In discussing the question of whether a right of action was given to the personal representative if the injury resulted in death, Justice Cardozo made it clear that he considered the liability to be one in tort when he wrote as follows at page 374:

> "Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. From that time forth withdrawal was impossible and abandonment a tort. Given a

> relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law."

An essential element of the tort, i.e., negligence, thus occurred in the port of departure. This factor appears neither in *New York Central R. R. Co.* v. *Chisholm, supra,* where the negligence occurred in Canada, nor in the case at bar, where the negligence occurred in Cuba.

The necessity for negligence as the basis for recovery under the Jones Act and further affirmation that liability thereunder sounds in tort, not contract, is found in *Jamison* v. *Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930). As Justice Cardozo stated, a seaman "is entitled to recover if his injuries resulted from * * * negligence" (p. 639), "* * * the Federal Employers' Liability Act does not create liability without fault" (p. 640).

Some argument was made in the opinion in *Taylor* v. *Atlantic Maritime Co., supra,* that the decision in *New York Central R. R. Co.* v. *Chisholm, supra,* is impaired by *Cortes* v. *Baltimore Insular Line, supra.* This argument is based on the statement in the latter case at page 377 that:

> "We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water."

Any distinction which Mr. Justice Cardozo pointed out in his decision in *Cortes* v. *Baltimore Insular Line, supra,* when read in context, relates only to the question of what constitutes negligence towards an employee on the part of a shipowner as against what constitutes negligence towards an employee on the part of a railroad company. No distinction is made as to the necessity for negligence. This is pointed up at page 377 by considerable discussion of the responsibility of a railroad company to rescue an employee

who has fallen from his locomotive as against the liability of the shipowner to rescue a sailor who has fallen into the sea. It is submitted that the holding of *New York Central R. R. Co.* v. *Chisholm, supra,* is not impaired, but is rather reinforced, in *Cortes* v. *Baltimore Insular Line, supra,* since the *New York Central* case involved a question of the applicability of a United States statute extraterritorially, whereas the *Cortes* case hinged rather upon what acts or failures to act constituted negligence towards an employee by a shipowner as compared with a railroad company, and involved no question of the locus of the act and its relation to the remedy sought. As a matter of fact, the *Cortes* decision required no jurisdictional discussion, involving, as it did, a tort committed aboard an American vessel (52 F. 2d 22) on a coastwise voyage (287 U. S. 370).

It is submitted that based on the decision in *New York Central R. R. Co.* v. *Chisholm, supra,* the question of whether the acts of a shipowner constitute negligence is not to be decided by extraterritorial application of the Jones Act when the alleged liability is incurred abroad, and that the decision in *Cortes* v. *Baltimore Insular Line, supra,* has the same effect.

The liability of the petitioner to the plaintiff for the injuries sustained aboard the petitioner's vessel, while that vessel was in Havana, Cuba, should, therefore, be governed by the Danish law, the law of the flag.

POINT III

Matters affecting only the internal economy and discipline of the vessel, arising between a foreign owner and a foreign seaman beyond the continental limits of the United States, should be governed by the law of the flag in accordance with accepted tradition and custom.

This action is one by a Danish seaman against the Danish owners of a Danish ship for injuries sustained aboard that Danish ship while moored in Havana, Cuba.

Larsen had signed articles in New York on the Danish form (Defendant's Exhibit A, 44, 45), calling for a voyage to "South America and further" (pre-trial order, 16). As shown in the statement of facts, Larsen recovered from the Danish shipowner all the benefits to which he was entitled by the terms of the articles which he signed. These benefits consisted of all necessary hospitalization expenses in Havana (pre-trial order, 16, 35, 49), free transportation from Havana to New York (pre-trial order, 16, 37), free hospitalization at the United States Marine Hospital on Ellis Island (pre-trial order, 16, 37, 49), free out-patient treatment at the Long Island College Hospital (pre-trial order, 16, 39, 49), maintenance and subsistence from December 10, 1946, the date he was discharged from the United States Marine Hospital at Ellis Island, until December 30, 1946 (90).

During the course of Larsen's treatment in New York, the petitioner offered him free transportation to Denmark for such further treatment as might be necessary, but this offer was refused by Larsen (50). In addition to the above benefits, Larsen received all wages due him up to the date of the accident (pre-trial order, 16, 39), and also received the seven days' wages to which he was entitled under the Danish Maritime Law (39-40, Defendant's Exhibit D, 90-92).

That Larsen was entitled to and accepted all these benefits is significant, in that he had chosen to bind himself by the terms of the articles which he signed as long as they would benefit him, but is now seeking, in addition, to go outside the terms of these articles in order to recover from the Danish shipowner under the Jones Act.

As has been pointed out under the Statement of Facts in the petition, the articles stated that each crew member, including Larsen, was employed in accordance with and subject to the provisions set forth in the Danish Seamen's Act (Def. Ex. A, 44, 45), and since Larsen was fully able to read Danish (46), there can be no question raised as to his understanding of the conditions of his employment.

It is submitted that on the facts of the case the liability of the petitioner, the Danish employer, to the employee, the Danish seaman, should be governed by the Danish law, the law of the flag, since a matter arising between a Danish shipowner and a Danish seaman, in a foreign port aboard a Danish ship, is purely a matter relating to the internal economy or discipline of that vessel and should be governed by the law of the flag, that is, the Danish law.

The criterion to be used in determining whether to apply the law of the port or the law of the flag with respect to events occurring aboard a foreign vessel was enunciated by the Supreme Court of the United States in 1887 in *Wildenhus's Case*, 120 U. S. 1, 7 S. Ct. 385, 30 L. Ed. 565. This involved the question of jurisdiction over an altercation between two Belgian seamen aboard a Belgian vessel, moored in Jersey City, New Jersey. As a result of the affray, one of the Belgians sustained a mortal wound, from which he afterwards died. Mr. Chief Justice Waite delivered the opinion of the Court and pointed out that under the law of civilized nations a merchant vessel of one country entering the port of another for the purposes of trade, normally subjected itself to the law of the place where it went, so that it owed temporary and local allegiance to the jurisdiction of the country. As to this general principle, however, he was careful to draw a distinction between internal discipline, rights and duties of the crew towards the vessel, all of which, he said, should be governed by the law of the flag, and, on the other hand, those matters which would affect the peace or dignity of the port, and drew this distinction in the following language (at page 12):

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all

> things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.

This same principle was again enunciated by this Court in *United States* v. *Rodgers,* 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893). Here it was held in an opinion by Mr. Justice Field that the courts of the United States had jurisdiction to try a person for an assault with a dangerous weapon, committed on a vessel belonging to a United States citizen, when that vessel was in the Detroit River, outside the jurisdiction of any particular state, but within the territorial limits of the Dominion of Canada. In so holding, Mr. Justice Field pointed out that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another nation, was not necessarily wholly exclusive, but in defining the limits of the exemption from local law, he wrote as follows (at page 265):

> "But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself."

The principle above set forth was further subscribed to by Mr. Justice Brewer in delivering the opinion of this Court in *Patterson* v. *Bark Eudora, supra.*

Application of the principle to a United States vessel in foreign waters can be found in *Thompson Towing & Wrecking Association* v. *McGregor,* 207 F. 209 (6th Cir., 1913). This was an appeal from a decree entered in a proceeding to limit liability respecting a boiler explosion on the lighter Stewart, which resulted in the instant death of Workman on board the vessel and in permanent injury to McGregor, both of whom were members of her crew. The explosion occurred in an arm or bay of Lake Huron in Canadian waters. McGregor and the administratrix of Workman commenced separate suits in the County Court of Michigan to recover damages for the permanent injuries and death mentioned. With respect to the question of the application of Michigan or Canadian law, Judge Warrington wrote as follows (at page 215):

> "Concededly the state suit was begun within the time fixed by the Michigan death statute. Can the right of action in terms preserved to the widow by that statute be enforced? If so, it is because at the time of the death the Stewart was through ownership and registration domiciled in Michigan and was, as respects the enforcement of such a right, part of the territory of Michigan. So far as this question is concerned, the ultimate basis of the decree was 'that the explosion of this boiler was a matter which did not directly involve the "peace, dignity, or tranquility" of the Canadian government, but rather involved the "internal discipline and management" of the ship.'"

In holding that the liability of the vessel for the death and injury was governed by the Michigan law, the Court subscribed to the language in *United States* v. *Rodgers, supra,* when Mr. Justice Field wrote as follows (at page 260):

> "The general rule is that the country to which the vessel belongs will exercise jurisdiction over all mat-

ters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquillity, in which case it may assert its authority."

A similar situation is found in *Grand Trunk Ry. Co.* v. *Wright,* 21 F. (2d) 814 (6th Cir., 1927), aff'd 278 U. S. 577, 73 L. Ed. 516, 49 S. Ct. 176. This involved an injury resulting in death, suffered by an employee on board a train ferry in American territorial waters, the ferry being of American registry, but having been chartered to defendant railroad, a Canadian corporation. The Court declared that the liability asserted rested upon the relationship of master and servant between a Canadian corporation and a Canadian resident, and was to be performed under the supervision of the defendent's corporate officers in Canada or in international adjacent waters. The Court held that the negligence involved was incidental to the internal discipline and management of the boat and that the Canadian Death Act was applicable rather than the Michigan Death Act or the Federal Employers' Liability Act, even though the act of negligence had taken place in United States waters.

It is submitted that the liability of the petitioner towards Larsen for the accident occurring aboard the Danish vessel S.S. Randa while in the port of Havana, Cuba, related only to the "internal economy and discipline" of the vessel, and for that reason should be governed by the law of the flag and should not call for the extraterritorial application of the statutes of the United States just because the articles signed by Larsen were entered into in New York. The only connection between the United States and the facts of this case is that Larsen was temporarily in New York at the time he signed aboard the vessel. That this fortuitous circumstance should entitle him to proceed in the United States Courts to recover from the Danish shipowner for an injury in Havana, Cuba, is to stretch extraterritorial application of our statutes to the breaking point.

Support for the contention that the "law of the flag" doctrine is still very much alive, can be found in *Kyriakos* v. *Goulandris, supra,* and *Taylor* v. *Atlantic Maritime Co., supra,* the very two cases relied upon by the Court of Appeals for the Second Circuit in affirming the judgment of the Trial Court herein. In *Kyriakos* v. *Goulandris, supra,* Kyriakos, a Greek seaman who signed on a Greek vessel then in the United States, for a voyage to England and return, sought recovery for injuries sustained while the vessel was in the port of Fernandina, Florida. In the majority decision, Judge Augustus Hand set forth the rule as follows (at page 138):

> "It is true that in the absence of any statute, liability for a tort committed on board a vessel while the vessel is in the territorial waters of a state is determined, if it affects only the internal economy or discipline of the vessel, by the law of the state whose flag the vessel flies. American Law Institute Conflict of Laws § 405."

That this was the accepted rule in the Second Circuit as to matters relating to the internal economy or discipline of the vessel, finds further support in the dissenting opinion of Judge Learned Hand, when he stated at the beginning of his opinion (at page 139):

> "As my brothers agree, it is generally accepted law that in all matters relating to 'the internal economy or discipline' of a ship 'the law of the flag' controls. I have gathered in the margin * a number of decisions which invoke this principle in varying applications; nobody disputes it; and it seems to me most unde-

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* "*The Scotland,* 105 U. S. 24, 26 L. Ed. 1001; *The Belgenland,* 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; *United States* v. *Rodgers,* 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071; *Cunard S.S. Co.* v. *Mellon,* 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306; *Thompson Towing & Wrecking Association* v. *McGregor,* 6 Cir., 207 F. 209, 217-219; *Rainey* v. *New York & P. S.S. Co.,* 9 Cir., 216 F. 449, 454, L. R. A. 1916A, 1149; *The Hanna Nielsen,* 2 Cir., 273 F. 171; *Grand Trunk R. Co.* v. *Wright,* 6 Cir., 21 F. (2d) 814; *Cain* v. *Alpha S.S. Corp.,* 2 Cir., 35 F. (2d) 717."

sirable, except for some pressing reason of domestic policy, to disregard it. It is a hardship to owners, and it may be to seamen, to have their legal relations depend upon the accident of the port of call at which the ship puts in; it is impossible to adjust affairs to constantly shifting standards, some of which will favor one party, some, another. Moreover—and this, I think, we should treat most seriously—it must often be irritating to the state of the flag for the state of a port of call to insist that its own notions of what is just between owner and crew shall supersede those satisfactory to the first state."

In *Taylor* v. *Atlantic Maritime Co., supra,* Taylor, a Panamanian citizen, sought to recover for aggravation of tuberculosis from the Panamanian shipowner, Taylor having signed articles in Norfolk, Virginia. Judge Learned Hand delivered the opinion of the Court and set forth the rule in the following terms (page 598):

"Under the ordinary convention, if a seaman is injured on the high seas, his rights are the same as though he had been injured within the country of the ship's flag;[7] unless the owner be American.[8]"

As to the use of the terms "It is true that in the absence of any statute," in *Kyriakos* v. *Goulandris, supra,* and "Under the ordinary convention," in *Taylor* v. *Atlantic Maritime Co., supra,* it has been indicated above under Point I that Section 33 of the Merchant Marine Act of 1920, known as the Jones Act, does not make the provisions of that section applicable to foreign seamen serving aboard foreign ships who are injured outside United States waters.

In *Sonnesen* v. *Panama Transport Co., supra,* Sonnesen, a Danish seaman, sought to recover under the Jones Act from the Panamanian owner for aggravation of tubercu-

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[7] "*The Hamilton,* 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264; *Cunard S.S. Co.* v. *Mellon,* 262 U. S. 100, 123, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306."

[8] "*Gerradin* v. *United Fruit Co.,* 2 Cir., 60 F. 927."

losis based on the fact that he had signed articles in New York. In denying the plaintiff recovery under the Jones Act, Judge Desmond, in a unanimous opinion, wrote as follows (p. 267):

> "The general rule of maritime law is that tort liability on the high seas is determined by the law of the flag (*O'Neill* v. *Cunard White Star*, 160 F. 2d 446; see *Resigno* v. *Jarka Co.*, 248 N. Y. 225, 230; Robinson on Admiralty, pp. 238-239), which, in this case, is the law of Panama."

The opinion of Judge Learned Hand in *O'Neill* v. *Cunard White Star, Ltd., supra*, is extremely significant on this point. It should be noted again that Judge Learned Hand wrote this opinion after he had been overruled by the majority in *Kyriakos* v. *Goulandris, supra*, but before he wrote the opinion in *Taylor* v. *Atlantic Maritime Co., supra*. In this case the Court denied Jones Act relief to the administratrix of a British seaman injured on the high seas, the seaman having signed articles in Britain to serve aboard a British vessel—this, even though the deceased had been a long-time resident of the United States. Judge Learned Hand discussed the holdings of the prior cases (including the *Kyriakos* case) in the same Court on the question of the application of the Jones Act to foreign seamen serving aboard foreign vessels and wrote as follows (at page 448):

> "* * * The three decisions we have mentioned do not help us to decide whether we should now hold that the Jones Act interposes to change what would otherwise be the rights and duties of the parties, because *in all three the act or omission was within our waters.* In each the question was whether an act of Congress, at least literally applicable to the situation, should yield to the doctrine that so far as concerns the 'internal economy' of a foreign ship, the law of the flag applies while she is in a foreign port * * *. In the case at bar the situation is just reversed: we are to say, not when the Jones Act should give place to the

law of the flag, but *when the law of the flag should give place to the Jones Act in places where the Jones Act does not expressly apply* * * *." (Emphasis supplied.)

After writing this opinion in *O'Neill* v. *Cunard White Star Line, Ltd., supra,* in which he held that there was nothing in the language of the Jones Act to indicate that it was to be applied to injuries occurring on the high seas, Judge Learned Hand followed, in 1950, with the opinion in *Taylor* v. *Atlantic Maritime Co., supra.* In discussing, in the latter case, the law of the flag, the Jones Act and foreign seamen, Judge Learned Hand wrote as follows (at page 598):

> "When a seaman signs articles in a foreign port for service on an American ship, and is injured on the high seas, there is no embarrassment, whether one regards the claim as sounding in tort, or in contract. So far as it sounds in tort, it depends upon American law—the law of the flag—; so far as it sounds in contract, although the law of the place where the contract is made will ordinarily apply, it is a well-recognized exception that in all that concerns the 'internal economy' of the ship the law of the flag controls.[9]"

Judge Hand has stated, in effect, that the seaman who signed on an American vessel in a foreign port will be governed by the law of the flag if his claim sounds in tort, and that if his claim sounds in contract, an exception to the law of the place where the contract was made will still cause the law of the flag—that is, American law—to apply. Logically, it should follow, if the same rule were applied to a foreign seaman signing on a foreign ship in a United

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[9] "*The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; *United States* v. *Rodgers*, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071; *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306; *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 6 Cir., 207 F. 209; *Rainey* v. *New York & P. S.S. Co.*, 9 Cir., 216 F. 449, L. R. A. 1916A, 1149; *The Hanna Nielsen*, 2 Cir., 273 F. 171; *Grand Trunk R. Co.* v. *Wright*, 6 Cir., 21 F. 2d 814; *Cain* v. *Alpha S.S. Corp.*, 2 Cir., 35 F. 2d 717."

States port, that if the claim sounds in tort, the law of the foreign flag will apply, and if the claim sounds in contract, that same exception to the law of contract should apply and the law of the flag—the foreign law—should be applied to that claim.

That is the substance of petitioner's argument—i.e., that as to matters within the "internal economy" of the vessel, the law of the flag and the law of the place of the injury predominate over the law of the place where the hiring contract was made.

POINT IV

The facts in this case are not governed by the decisions of the Court of Appeals for the Second Circuit in *Kyriakos* v. *Goulandris* or *Taylor* v. *Atlantic Maritime Co.*

This action is one by a Danish seaman against the Danish owners of a Danish vessel to recover damages for injuries sustained aboard the Danish vessel while in the port of Havana, Cuba. The Danish seaman signed articles on the Danish form in New York for a voyage to South America and further. After the injury the Danish seaman, Larsen, recovered all the benefits to which he was entitled under the terms of the articles which he had signed and under the terms of the Danish law. Defendant's motions made at the end of the plaintiff's case, at the end of the defendant's case and after the jury verdict, to dismiss the complaint for lack of jurisdiction, were all denied by the Trial Court. These motions were made on the grounds that this was an action between citizens of Denmark and, therefore, outside the jurisdiction of the Court. In addition, the Trial Court denied defendant's request to charge that the jury must find for the defendant if it found that the defendant had fulfilled its obligations under the Danish law, and the Court charged the jury that the Danish law had no application to

the case. From this charge the defendant excepted. On appeal to the United States Court of Appeals for the Second Circuit, the judgment of the Trial Court was affirmed on the authority of *Kyriakos* v. *Goulandris, supra,* and *Taylor* v. *Atlantic Maritime Co., supra.*

It is submitted that the facts in this case are such that they are not governed by the decisions in *Kyriakos* v. *Goulandris, supra,* and *Taylor* v. *Atlantic Maritime Co., supra,* but that the essential facts of the instant case are such as to require an independent ruling as to the applicability or the nonapplicability of the Jones Act.

Before examining the opinions of the United States Court of Appeals for the Second Circuit in the *Kyriakos* and *Taylor* cases, it would be well to survey briefly the earlier decision in order to determine what factors the courts have considered determinative of the application of the Jones Act to foreign seamen and to foreign vessels.

In 1937 in *The Paula,* 91 F. (2d) 1001, 1937 A. M. C. 988, cert. den. 302 U. S. 750, 58 S. Ct. 270, the United States Court of Appeals for the Second Circuit affirmed the District Court decree dismissing the libel and declining to exercise jurisdiction in a case involving a German seaman who had signed articles in Chile to serve on a Danish ship on a voyage to Brooklyn, New York. While the vessel was at the intermediate port of Jacksonville, Florida, the libelant was injured during the performance of his duties on board the ship. The District Court declined jurisdiction and relegated the seaman to his claim under Danish law before the Danish Consul. In disposing of libelant's claim that the District Court had jurisdiction under Section 33 of the Merchant Marine Act of 1920, Judge Swan wrote (pp. 1003, 1004):

> "The libelant claims not only under the maritime law but also under section 33 of the Jones Act (46 U. S. C. A. § 688). He asks us to rule that this applies to an alien seaman on a foreign ship who signed on at a foreign port, if he sustains injury in a port of the United States through the negligence of a fellow sea-

man. This question was expressly left open in Plamals v. Pinar Del Rio, 277 U. S. 151, 155, 48 S. Ct. 457, 72 L. Ed. 827. Precise authority on it is meager. Such as there is has answered the question in the negative. The Seirstad, 27 F. (2d) 982 (D. C. E. D. N. Y.); The Magdapur, 3 F. Supp. 971 (D. C. S. D. N. Y.). * * * We think the intention to legislate for alien seamen who have signed articles abroad on a foreign ship ought to be clearly expressed before the courts extend the statute to them."

With respect to the libelant's recovery under the Danish law, the opinion reads as follows (at page 1003):

"It is not disputed that the Danish law gives the libelant a right to medical expenses for a limited period (which the respondent has already satisfied) and a right to compensation for injuries from a governmental insurance fund, out of which payment may be obtained in the United States by presentation of a claim to the Danish Consul. These rights are substitutes for maintenance and cure and the right to indemnity recognized by the general maritime law; and the substituted remedy is available in New York where the alien and his witnesses are present; hence no injustice results from leaving him to that remedy."

In 1942, in *Gambera* v. *Bergoty*, 132 F. (2d) 414, 1943 A. M. C. 45, cert. den. 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699, the United States Court of Appeals for the Second Circuit modified the doctrine of *The Paula* to the extent that relief under the Jones Act was granted to an Italian seaman injured on board a Greek ship in territorial waters of the United States. In denying the respondent's motion to dismiss the libel in the District Court for the Southern District of New York, Judge Coxe commented on the facts in the following terms (39 F. Supp. 871):

"The affidavits submitted on behalf of the libelant show that he is an Italian, who has resided since 1920 in the United States. He served in the United States Army in 1927 and 1928, receiving an honorable discharge on March 12, 1928, and in 1937 filed his first

> papers for naturalization as a United States citizen. He was hired by the captain of the S.S. Emmy at Trenton on December 21, 1939, for a voyage to Philadelphia and Norfolk, and thence to New York, where he was to be discharged. The injury took place on December 23, 1939, as the vessel was proceeding from Trenton to Philadelphia. * * * He has never been in Greece, does not speak the language, the witnesses are here, and it would be a clear denial of justice if he were required to go to Greece to litigate his claim."

That the United States Court of Appeals for the Second Circuit, in affirming the denial of respondent's motion to dismiss, considered that the locus of the voyage and the citizenship status of the libelant were significant, is shown by the language of Judge Learned Hand (132 F. (2d) 415):

> "Not only had the libelant been domiciled in the United States for over twenty years, during the greater part of which he had served on American ships, but the voyage began and ended in the United States; it was from Trenton to Philadelphia, Norfolk and New York, and he was injured on the leg between Trenton and Philadelphia. The whole voyage was thus to be performed within our territorial waters except possibly for a part of the leg between Norfolk and New York. *That presents a wholly different situation from any that have hitherto arisen.*" (Emphasis supplied.)

Judge Learned Hand held that Gambera's libel stated a good claim *in personam* which should be tried on the merits.

The doctrine of *The Paula*, therefore, was only modified to the extent that relief was granted because of the pseudo-United States citizenship of the libelant and because the voyage began and ended within the territorial limits of the United States, and that the injury occurred within the limits of that voyage within United States waters.

Even after this decision in *Gambera* v. *Bergoty, supra*, it had never yet been held that the terms of the Jones Act were applicable to an injury sustained by a bona fide alien serving aboard a foreign vessel, quite irrespective of the place of the injury.

The first deviation from this principle and from the accepted interpretation of the intended application of the Jones Act occurred in the decision of the United States Court of Appeals for the Second Circuit in *Kyriakos* v. *Goulandris, supra,* in 1945. But even in that case, as will be pointed out, the facts were not such as to govern the determination of the case at hand.

Kyriakos, a citizen of Greece, was employed as a fireman aboard the S.S. Theomitor, and sued to recover for injuries sustained as a result of an assault by a fellow seaman in April, 1942, in Fernandina, Florida. He asserted causes of action for cure, maintenance and wages to the end of the voyage, and, under the Jones Act, for damages arising from the negligence of the respondents, their servants and employees. The articles signed by Kyriakos in New York City in March, 1941, called for a voyage from Newport News to England and back to the United States. Kyriakos was engaged along with several others at the office of the Greek Line in New York, pursuant to orders received from the captain of the vessel. The Greek Line paid the expenses of his transportation to Newport News, where he joined the ship. The Trial Court, in an opinion by Judge Bondy, awarded Kyriakos the sum of $17,500 as damages, holding that Kyriakos was entitled to maintain his action under the Jones Act. The reasons for this decision are set forth in the opinion of Judge Bondy (63 F. Supp. 19, 20):

> "The libellant is a citizen of Greece. He was assaulted at Fernandina, Florida, by a fellow seaman while serving as a fireman on the *Theomitor,* a vessel flying the flag of Greece and owned in Greece by the respondent Michael Polemis.
>
> The libellant was hired for a voyage from Newport News, Virginia to England and back to the United States.
>
> The fact that the libellant was an alien seaman serving upon a foreign ship owned and operated by aliens does not deprive him of the right to maintain this action under the Jones Act, in view of the fact that he resided in the United States, that he was in-

jured within territorial waters of the United States while in the service of the ship on a voyage that began and was to end in the United States. *Gambera* v. *Bergoty*, 2 Cir., 132 F. (2d) 414, certiorari denied 319 U. S. 742, 63 S. Ct., 1030, 87 L. Ed. 1699; See *Uravic* v. *Jarka Co.*, 282 U. S. 234, 239, 1931 A. M. C. 239; Compare *The Paula*, 2 Cir., 91 F. (2d) 1001."

Subsequently, the respondents appealed from the judgment of the trial court to the United States Court of Appeals for the Second Circuit. On the appeal it was contended by the appellants that Kyriakos could not sue under the Jones Act, because it gave no remedy to an alien employed on a foreign ship. The Court of Appeals for the Second Circuit, in an opinion by Judge Augustus Hand, could find nothing in the record to support the statement of Judge Bondy that the libelant was a resident of the United States, since Kyriakos had testified that he had come to this country as a seaman and had signed off the vessel which had brought him to the United States because it was undergoing repairs. On this point, Judge Augustus Hand wrote as follows (151 F. (2d) 136):

"He had been here for an unspecified period, which was certainly less than three months, when he signed on the *Theomitor*. His stay in this country since his injuries were sustained is not sufficient, under all the circumstances, to show that he had acquired a residence in the United States when he signed on which would give him a right of action under the Jones Act. *Gambera* v. *Bergoty*, 2 Cir., 132 F. (2d) 414, certiorari denied 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699."

After conceding in this manner that the facts of the case were not such as to fall under the holding in *Gambera* v. *Bergoty, supra*, Judge Augustus Hand framed the question presented to the Court in the following terms (at p. 136):

"We are thus called upon to determine whether an alien seaman who signed on in an American port for a voyage beginning and ending in American waters can sue under the Jones Act."

The opinion of the Court then followed with a reference to *Strathearn S.S. Co.* v. *Dillon, supra,* which has been fully discussed in this brief under Point II. The majority concluded, on the authority of *Patterson* v. *Bark Eudora, supra,* and *Strathearn S.S. Co.* v. *Dillon, supra,* that Congress undoubtedly had authority to make a statute such as the Jones Act applicable to foreign vessels in our ports.

Then, in answer to the question posed as to what the Court was called upon to determine, Judge Augustus Hand wrote as follows (at p. 137):

> "In the instant case the libelant signed on in an American port *and he was injured in an American port.* We think this is sufficient both on reason and on authority. The intention of Congress to benefit American seamen would not be served by a contrary construction of the statute, since it would tend to encourage the hiring of foreign seamen *in American ports* in preference to American seamen because the aliens would not have the right of suit against their employers *if injury should occur in those ports,* while American seamen would." (Emphasis supplied.)

The discrepancy between the framing of the question presented to the Court, as set forth on page 136, and the answer, as set forth on page 137 of the opinion in 151 F. (2d), should be noted. The opinion states that the Court was called upon to determine whether an alien seaman who signed on in an American port for a voyage beginning and ending in American waters could sue under the Jones Act. But the answer, as set forth on page 137, makes much of the fact that the injury itself took place in an American port.

There is nothing in the opinion of the majority to indicate that the holding would have been the same had Kyriakos been injured either on the high seas or in a foreign port.

The differences in the essential facts of the *Kyriakos* case and the instant case are numerous.

Firstly, it should be noted that Kyriakos signed articles for a voyage from a United States port to England and then back to the United States. Larsen, however, signed articles in a United States port, calling for a voyage to South American ports and further and binding Larsen to serve aboard the vessel for an indefinite period, while at the same time granting him the right to give seven days' notice of his intention to leave the vessel. Nothing in the articles signed by Larsen indicated that the vessel was to return to the United States or that the owner was under any obligation whatsoever to return him to the United States for discharge in this country.

Secondly, Kyriakos was injured ashore in Fernandina, Florida, when he was assaulted by a fellow crew me[illegible] who had also been signed on at the same time as Ky[illegible] Larsen, on the other hand, was injured aboard the [illegible] vessel, S.S. Randa, while that vessel was moored in Hava[illegible] Cuba. The opinion of Judge Augustus Hand in *Kyriakos* v. *Goulandris, supra,* indicates clearly that the majority was greatly swayed by the fact that the injury to Kyriakos had occurred in a United States port.

Thirdly, there is nothing in the opinions in the *Kyriakos* case to indicate that Kyriakos received any benefits or obtained any recovery under the Greek law, that is, the law of the flag. As a matter of fact, at the time of the injury, Greece itself was in the hands of the German occupation forces, having been so since 1941, and whatever Greek government was in power at the time was, at best, a government in exile with no authority within its own country. Larsen, however, proceeded to recover and did, in fact, recover all the benefits to which he was entitled under the terms of the Danish seamen's law and under the terms and conditions of the articles which he had signed on the Danish form. In addition, as has been pointed out under the Statement of Facts, there were available to Larsen additional medical benefits, if such had been required, in Denmark, but Larsen refused the offer of repatriation.

Repatriation in the case of Kyriakos was obviously impossible. In short, Kyriakos had no remedy available to him other than under the United States law.

The chasm existing between the instant case and *Kyriakos v. Goulandris, supra,* is clearly supported by the opinion of Judge Learned Hand in *O'Neill* v. *Cunard White Star, Ltd., supra.* As has been pointed out under Points I and II of this brief, the United States Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, stated that the provisions of the Jones Act did not appear to be applicable to an injury sustained on the high seas. In deciding whether the Jones Act was applicable to a British seaman injured on the high seas aboard a British vessel, the opinion discussed the cases of *The Paula, supra, Gambera* v. *Bergoty, supra,* and *Kyriakos* v. *Goulandris, supra,* and with respect to these three cases wrote as follows (160 F. (2d) 448):

> "The three decisions we have mentioned do not help us to decide whether we should now hold that the Jones Act interposes to change what would otherwise be the rights and duties of the parties, because in all three the act or omission was within our waters."

The very same argument must be applied here, for Kyriakos was injured in a United States port, whereas Larsen was injured aboard the vessel in a foreign port, and if the *Kyriakos* case did not help the Court decide the *O'Neill* case, it most certainly cannot be cited as authority for the instant one.

The latest ruling on this question and the second case relied upon by the United States Court of Appeals for the Second Circuit in affirming the judgment of the Trial Court in the instant matter is *Taylor* v. *Atlantic Maritime Co., supra.*

The decision of Judge Hulbert in the United States District Court for the Southern District of New York on defendants' motion to decline jurisdiction is reported at 86 F. Supp. 496, 1949 A. M. C. 1192, and indicates that Taylor

signed articles at Norfolk, Virginia, on August 7, 1947, as an able-bodied seaman, and continued in the employ of the defendants on the vessel S.S. Atlantic Air until November, 1948. The complaint alleged that in March, 1948, Taylor became very sick "through no fault of his own, but entirely through the fault of the defendants, their agents, servants and employees, in failing to furnish him with a safe place in which to work, and to provide him with a safe and seaworthy vessel." It was also alleged in the complaint that the plaintiff was a resident of the City of New York, of Panamanian nationality, and that the defendant Atlantic Maritime Company was a Panamanian corporation, existing under and by virtue of the laws of Panama, doing business through its agent, S. Livanos & Co., with an office in the City of New York. In the course of the opinion, Judge Hulbert pointed out that there was nothing in the moving papers to indicate where the vessel went after leaving Norfolk, Virginia, except to indicate that in August of 1948 the vessel was in Sydney, Australia. Judge Hulbert granted the motion, and wrote as follows (at p. 498):

> "The Jones Act does not afford protection to 'a seaman of foreign residence and nationality suing a non-American ship owner for an alleged tort committed on a non-American ship on the high seas.' *Sonnesen* v. *Panama Transport Co.*, 298 N. Y. 262, 82 N. E. 2d 569, 570; cf. also *O'Neill* v. *Cunard White Star, Ltd.*, 2 Cir., 1947 A. M. C. 505, 160 F. (2d) 446. The General Maritime Law of the United States is also not applicable to the facts of this case, but rather under familiar principles the law of the flag, viz. Panama, is the law that must be applied. Under these circumstances, this Court should not entertain jurisdiction of this action, but should relegate plaintiff to the appropriate forum in Panama."

Thereafter the plaintiff appealed from this judgment dismissing his complaint, but died before the decision of the United States Court of Appeals for the Second Circuit. The opinion of the Court of Appeals was written by Judge

Learned Hand, who had written the very strong dissent to the *Kyriakos* case and who, in the *O'Neill* case, had held that the provisions of the Jones Act were not intended by Congress to be applicable to injuries sustained on the high seas or in a foreign port. The eventual holding of the Court was that the Jones Act was applicable to the recovery sought by the Panamanian seaman against the owners of the Panamanian vessel for the latter's failure to provide proper care and attention aboard the vessel, all of which allegedly led to aggravation of the plaintiff's tubercular condition; the plaintiff having signed articles in Norfolk, Virginia.

Such a short summary, however, of the holding of the Court can in no way convey the sense of reluctance which pervades the entire opinion. In order to convey properly this sense of reluctance, it would be necessary to quote the entire opinion at length, but suffice it to say for the moment that the opinion contains many more arguments for not applying the Jones Act than for reaching the conclusion which the Court eventually did.

Judge Learned Hand outlined the negative arguments and, from all appearances, seemed to support these negative arguments in the following terms (at p. 600):

> "Judge Clark thinks that, since the overriding purpose of the Jones Act is to protect seamen, it should be understood to include alien seamen and that the law of the flag must yield. Indeed, so far as concerns American seamen, we decided as much in Gambera v. Bergoty, supra; and it must be conceded that, if the doctrine there accepted does not extend to aliens who sign articles in an American port, American citizens may be at a disadvantage as against aliens in shipping foreign. To Judge Swan and me it seems, on the other hand, that, before we impute to Congress the will to change the long settled international understanding that the law of the flag controls in such matters, we should find a more definite expression of that purpose. We of course recognize that it is only a question of interpreting the statute, not of power; but the possible consequences of the innovation seem to us to forbid

its ready assumption under the facile phrase of the 'policy of the Act.' Nor does the possible disadvantage, at which our view might put American seamen, seem to us considerable enough to imply such a purpose, for there will be, we should suppose, only rare occasions when American seamen will find themselves forced to accept the greatly inferior standards of wages and living which prevail on most, if not all, foreign ships. Moreover, we both find strong support for our view in the decision of the Court of Appeals in Sonnesen v. Panama Transport Company, which is on all fours with the case at bar."

The above language which appears in the closing paragraph of the opinion clearly indicates that Judge Learned Hand, as well as Judge Swan, were unwilling to impute to Congress the will to change the long-settled international understanding that the law of the flag should control in such matters unless they could find a definite expression of that purpose.

Yet, there follows a conclusion which constitutes a complete reversal of the field, for instead of denying the applicability of the Jones Act, which the whole tenor of the opinion up to this point would indicate was the intention, Judge Learned Hand closed as follows (at page 600):

"*Nevertheless, in spite of what we should hold, were we free*, we think that, although Kyriakos v. Goulandris, supra, can be distinguished because the injury took place on shore, the rationale of the opinion went further; and that it construed the Jones Act as imposing its terms upon all owners who sign on crews in an American port. We do not think it fitting (especially in my own case) to distinguish that decision *by a circumstance which was not made pivotal;* but rather that we should accept and apply its doctrine as broadly as it seems to have been intended to go. Therefore, though for somewhat different reasons, we all agree that the judgment be reversed, and the action remanded for trial. Since the plaintiff died pending the appeal the suit must be revived under our Rule 9; but when that has been done, the judgment will be reversed." (Emphasis supplied.)

Referring to the earlier language of the opinion, we must conclude that the Court had found a definite expression of the purpose of Congress to change the long-settled international understanding that the law of the flag controlled in such matters. Where does the Court find this definite expression of the will of Congress? They find it, not in any language of the statute, not in any expression of Congress, but in their own decision in *Kyriakos* v. *Goulandris*, while at the same time admitting that the latter case could be distinguished on the grounds that the injury took place ashore.

How can the Court conclude that a decision holding that the Jones Act is applicable to the case of a foreign seaman who is injured in a United States port, constitutes a definite expression of Congress to change the long-settled understanding that the law of the flag controls in a matter involving an injury sustained by a foreign seaman aboard a foreign vessel while in a foreign port?

The closing sentences of the opinion quoted above make it abundantly clear that the Court considered itself bound by its own decision in *Kyriakos* v. *Goulandris*, with the result that it has held that the lone fact that the articles were signed by the foreign seaman in a United States port was sufficient to require the application of the Jones Act to a recovery by the foreign seaman against his employer, the foreign shipowner, for illness on the high seas. It should be noted that Judge Learned Hand said that he did not consider it fitting to distinguish *Kyriakos* v. *Goulandris* "by a circumstance which was not made pivotal," referring, no doubt, to the fact that Kyriakos was injured ashore in the United States in the course of a voyage which was to start and terminate in the United States. It is submitted that the fact that Kyriakos was injured in the United States during the course of a voyage starting and terminating in the United States was a definite factor in leading that same Court to hold that the Jones Act was applicable in that case, and finds ample support in the language of Judge Augustus Hand in the *Kyriakos* case, quoted earlier. That language

indicated that the whole decision in *Kyriakos* v. *Goulandris, supra,* was predicated on the three factors involving the United States, i.e., signing on in the United States, a voyage starting and terminating in the United States, and, finally, injury occurring within the United States. That Justice Learned Hand earlier considered these factors to have been "pivotal" is shown by the fact that in *O'Neill* v. *Cunard White Star, Ltd., supra,* he took pains to specifically point out that the *Kyriakos* case did not help him decide as to the applicability of the Jones Act to an injury sustained on the high seas, since the *Kyriakos* case involved an act of omission committed within United States waters. Why were these circumstances pivotal in 1947, but not in 1950?

But even if we were to concede for the purposes of argument that the decision of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Atlantic Maritime Co., supra,* was correct, the differences in the essential facts of the *Taylor* case and the instant case are so numerous as to require a holding that the *Taylor* case is no more authority for a decision on this matter than was *Kyriakos* v. *Goulandris, supra.*

Taylor was a Panamanian national, and it was alleged in the complaint that he was a "resident of the City of New York, State of New York" (86 F. Supp. 496). Larsen, the plaintiff herein, was a Danish citizen and a resident of Denmark, who was temporarily in New York City at the time he signed articles to serve aboard the S.S. Randa (pre-trial order, 16, 44, Defendant's Exhibit A, 44, 45).

At the time Taylor served aboard the S.S. Atlantic Air, she was of Panamanian registry and was owned by Atlantic Maritime Company, a corporation registered in Panama. The history of the vessel, however, indicates that she was the S.S. Elizabeth Blackwell and, until 1947, was owned by the United States War Shipping Administration, having been built in California in 1943. Until 1947, Atlantic Maritime Company was not listed in Lloyd's Register of Shipping as a shipowner, but after that year Atlantic

Maritime Company was listed as a Panamanian shipowner, owning ten ships, all of them ships previously owned by the United States War Shipping Administration. Briefs filed on behalf of Taylor's administrator in this Court upon the petition of Atlantic Maritime Company for a writ of certiorari indicate that the true situs of the control and operation of this vessel flying the Panamanian flag was in the United States. Since Taylor's cause of action has never proceeded to trial, the exact nature of the operation and control of the S.S. Atlantic Air have not been brought out. There is nothing in the record and in the final judgment in this case to indicate that the S.S. Randa was not a legitimate Danish vessel flying the Danish flag, registered in Denmark, and owned and operated by the Danish petitioner (pre-trial order, 16).

The *Taylor* case was an action to recover for aggravation of tuberculosis caused by the alleged failure of the shipowner to give the seaman proper care on board the ship. By reason of the nature of the illness, and the length of service of the seaman aboard the vessel, however, there was no specific geographical spot where it could be said that the conduct of the shipowner rendered it liable to the plaintiff, for it must be assumed from what we know that the shipowner's failure to give proper care was a continuous failure extending over the entire period of time that the plaintiff was aboard the vessel. The only geographical spot having any tangible significance, therefore, was the place of sign-on, that is, Norfolk, Virginia. In the instant action the plaintiff-respondent has obtained a final judgment for a specific incident occurring aboard the owner's vessel while that vessel was moored in Havana, Cuba. Unlike the *Taylor* case, we can now point to specific conduct aboard the S.S. Randa in a specific foreign port where the shipowner incurred a possible tort liability, and there is no longer any need to refer to the port of sign-on in an effort to resolve the conflict of laws problem.

Although the opinion in the *Taylor* case does not specifically state that Taylor did not recover from the ship-

owner under the Panamanian law, the law of the flag, the entire tenor of the opinions make it clear that the plaintiff in that case had sought to recover solely under the terms of the Jones Act, and had evidently considered it not worthwhile proceeding under the terms of the Panamanian articles which he had signed. In the instant case, however, as shown in the Statement of Facts, Larsen recovered from the Danish shipowner all the benefits to which he was entitled under the terms of the articles which he had signed and under the provisions of the Danish Seamen's Law. The extent of these benefits has been set forth above. That Larsen accepted all of these benefits is significant in that he had chosen to bind himself by the terms of the articles which he signed as long as they would be of benefit to him, but later sought, in addition, to go outside the terms of these articles in order to recover from the Danish shipowner under the laws of the United States.

Lastly, what was involved in the *Taylor* case was a question of the contractual obligation of the shipowner to care for an ill seaman, whereas in the instant case the question involved is one of whether the tort liability of a fellow seaman of Larsen's is to be imputed to Larsen's Danish employer.

It is submitted, therefore, that the facts of and the law applicable to the instant case are not governed by the decision of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Atlantic Maritime Co.*, *supra*.

There should be, therefore, a determination by this Court as to whether the Jones Act governs the liability of a foreign shipowner to a foreign seaman who signs on a foreign vessel in a United States port and is subsequently injured in a foreign port by reason of the negligence of a fellow seaman, when the injured seaman has recovered all the benefits to which he is entitled under the articles which he signed and under the laws of the country whose flag the vessel flies.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of the petition. . . .

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Respectfully submitted,

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